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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1167

LION DRY GOODS, INC.,

Petitioner,

vs.

RETAIL STORE EMPLOYEES UNION, LOCAL 954, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NO. 128 and 633,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner herein, Lion Dry Goods, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on October 17, 1967.

OPINIONS BELOW.

The judgment of the Court of Appeals was entered without opinion.

The opinion of the United States District Court for the Northern District of Ohio, Western Division, affirmed by the Court of Appeals October 17, 1967, is unreported. It is, however, printed in the appendix hereto *infra*, p. 18.

A previous opinion of the Court of Appeals, which reversed an earlier summary judgment entered by the Dis-

trict Court after remand by this Court's decision in 369 U. S. 317, is reported in 341 F. (2d) 715; (cert. denied 382 U. S. 839) and printed in the appendix hereto *infra*, p. 26.

STATEMENT OF JURISDICTION.

The judgment of the Court of Appeals was entered on October 17, 1967, appendix, *infra*, p. 45. A petition for rehearing was filed November 2, 1967 and denied November 8, 1967. By order of this Court by Mr. Justice Stewart, the time in which to file this petition was extended to March 6, 1968.

Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

Where a strike settlement agreement *limits the right to invoke arbitration to the aggrieved employee,* may a labor union which has not been chosen as the representative of the employees as provided in the agreement file and process "a grievance and complaint" with the arbitrator for a final decision?

Where a strike settlement agreement's grievance-arbitration machinery has been recognized by this Court as being limited to grievances presented by individual employees, can a District Court give a labor union which has by the express terms of the strike settlement agreement disclaimed representation rights the right to invoke and process grievances and enforce an arbitration award under Section 301(a) of the National Labor Relations Act in its own name?

In an action to enforce an arbitration award can a Court ignore the precise language agreed upon by the parties and rely instead on an "ancient maxim" pertaining to the common law to determine who can invoke arbitration?

When the parties to a strike settlement agreement provide for individual employee grievances to be heard by a three-member panel, is a hearing by and a decision of a two-member panel entitled to enforcement under Section 301(a)?

In suits to enforce an arbitration award "directing reinstatement" of an employee do Courts have jurisdictional power to add to and expand upon the arbitrator's award by ordering, in addition to reinstatement, back pay with interest?

STATUTE INVOLVED.

The only constitutional or statutory provision involved in this case is Sec. 301 (a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185 (a), which reads as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

This petition for certiorari arises out of extended litigation involving the arbitration provisions of a Statement of Understanding[1] or "strike settlement agreement" which was delivered over to the Toledo Labor-Management-Citizens Committee,[2] a public mediation agency, at the conclusion of a labor dispute involving the petitioner and other retail department stores in Toledo, Ohio, and the respondent Unions.

The background of this Statement of Understanding[3] is set forth in this Court's opinion in *Retail Clerks International Association, etc. v. Lion Dry Goods, Inc., et al,* 369 U. S. 17; and also in *Retail Clerks International Association v. Lion Dry Goods, Inc.,* 341 Fed. (2d) 715 (cert. denied, 382 U. S. 839).

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[1] Set out in full in appendix hereto *infra,* pp. 45-47.

[2] Hereinafter called L-M-C.

[3] Variously also called "strike settlement agreement" and "memorandum of understanding."

These earlier decisions involved procedural rulings, the first one holding that the Statement of Understanding (the one also involved here) was one cognizable by the District Court under Sec. 301(a), 369 U. S. 17, pp. 29, 30. The second case reversed a summary judgment entered upon remand and held, among other things, that * * * the Union did not have a right to arbitrate grievances of individual employees, 341 Fed. (2d) 715, 721, 722.

After the second case was remanded to the District Court, it was consolidated for trial with three subsequently filed cases, one of which is this case and the only one of the four appealed to the Court of Appeals.

This petition, then, seeks review of decisions made the first and only time the District Court considered the issues on the merits.

The petitioner had been a member of a multi-employer bargaining unit prior to a strike of employees of one of the stores—Lasalle's. The petitioner's employees did not then or any time thereafter go on strike.

At the start of the strike against Lasalle's the Union withdrew from the multi-employer bargaining, whereupon the petitioner filed a petition with the National Labor Relations Board asking that an election be conducted to determine whether its employees wanted the Union as its statutory representative. This petition was still pending when hostilities between the Union and Lasalle's ceased. It was withdrawn upon the Union's disclaimer of representation as set forth in the Statement of Understanding.

The relevant provisions of the Statement of Understanding subscribed to by the parties provide:

> "2. * * * Nothing contained herein is to be construed as giving recognition to the Union unless at some future time within the discretion of the Union, the Union is certified as having been chosen by a

majority of employees in a single store unit election conducted by the National Labor Relations Board.

"3. The Union agrees it will not request bargaining rights unless it proves its right to represent the employees as provided in Paragraph 2 above; * * *.

"4. *Any individual employee* who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with the L-M-C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the Chairman of the L-M-C, who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding * * *."

To this date the Union has not sought or requested the right to represent the employees of the petitioner through the means provided for in the Statement of Understanding, or otherwise.

Union, Not Individual Employee, Invoked Arbitration.

An employee of the petitioner, one Ruth Morris, was separated from her employment. As the respondent Union admits in its complaint in the District Court, "a grievance and complaint on behalf of the aforesaid Ruth Morris was thereafter filed by the plaintiffs, Locals 128 and 633, with the L-M-C for arbitration, pursuant to the agreement of December 24, 1958."

The District Court complaint then went on to relate that after the grievance and complaint was filed by the respondent Union, an L-M-C panel, "vested with jurisdiction * * * pursuant to the agreement of December 24, 1958," ruled on July 16, 1959 that Ruth Morris was wrongfully and improperly discharged by petitioner.

As its first defense in the District Court, the petitioner claimed that the complaint failed to state a claim "upon which relief could be granted to these plaintiffs."

In its second defense the petitioner claimed that the receipt of a grievance and complaint from the Union by the L-M-C and any action taken thereon was without authority because the L-M-C was not vested with jurisdiction to hear grievances and complaints filed by the Union. The petitioner specifically alleged that any authority given to any L-M-C panel by the Statement of Understanding was limited to grievances of individual employees who first presented his or her grievance to his or her supervisor and to the Personnel Department of the petitioner without reaching a satisfactory solution.

In its answer the defendant further alleged that it did not consent to a panel otherwise than from the L-M-C to hear employee grievances and further, that its refusal to appear before a group which was not an official L-M-C panel was not without prior notice to Michael J. Doyle, Chairman of the L-M-C; facts established when the case was heard.

When the case came to trial, no attempt was made by either party to dispute the admission in the complaint that the grievance had been filed with the L-M-C by Locals 128 and 633 rather than by the individual employee.

The trial court disposed of the principal issue made by the pleadings, and about which there is no factual dispute, i.e., the right or authority of the Union to invoke and process grievances of the individual employees to the L-M-C committee and/or to petition the District Court to enforce an award of the L-M-C committee under Section 301(a) by stating:

> "The Court prefers to rely on the ancient maxim, which is the basis of a large area of our common law

jurisprudence, 'Qui facit per alium, facit per se' ", rather than the literal language of the settlement agreement providing that "any individual employee who may have a grievance * * * may take his case to the Chairman of the L-M-C * * *." [Appendix A, *infra* p. 19.]

Relying, then, on this ancient maxim rather than the language of the agreement of the parties, the Court concluded that "an individual employee is no less an individual because he seeks the active assistance of his Union and its counsel to counter-balance the weight of his employer's forces of knowledgeable personnel and learned counsel." It was sufficient, the Court said, that the complaints were those of individual employees and that the relief sought would inure to each employee alone and separately.

Undisputed Facts Vary Firm Agreement.

At the trial Monsignor Doyle stated that an L-M-C panel always consists of three persons; a representative of labor, management and the public. At the July 16, 1959 hearing when the decision relative to Ruth Morris was made, only two persons were present. The management member, according to Monsignor Doyle's testimony, "was unable to appear, so I sent him a letter of what transpired."

The annual report of the L-M-C for the year 1958 which stated (referring to the Statement of Understanding) "it provided for unsettled grievances to be arbitrated by a Board of arbitrators to be named by Monsignor Doyle, *not as an L-M-C panel,* but as an Arbitration Board designated by Monsignor Doyle under the terms of the settlement agreement," was brushed aside by the trial court as having no probative value even though it was

identified by the Chairman as being issued over his signature and after his approval.

The parties stipulated that on July 22, 1959 (more than three weeks prior to the date of the "two-member" panel hearing and decision) Monsignor Doyle informed counsel for the petitioner that he saw no purpose in holding arbitration meetings until clarification was made by the Federal Court of the position of the L-M-C panel. Also, Monsignor Doyle admitted that it was not until December 14, 1959 (almost five months after the July 16th hearing and decision) that he informed petitioner's counsel of the decision to go ahead with hearings.

In face of these undisputed facts the trial court's opinion holds that in failing or refusing to attend the July 16th hearing, "the defendants simply defaulted in these proceedings, and are in no better position than anyone else who defaults."

In not issuing a written opinion at the time of its October 17, 1967 order and in refusing the petitioner's plea (in a petition for reconsideration) for a written opinion so that the parties, other litigants and courts would have guideposts to follow, the District Court opinion contains, in effect, the law of the Sixth Circuit. The District Court held:

(1) Despite a provision in an agreement *limiting the right to invoke arbitration to an individual employee,* a labor union not the statutory bargaining agent for employees can, over the objection of the employer, invoke arbitration and even maintain, as the plaintiff, an action for enforcement of an award; an ancient common law maxim rather than the contract language being controlling.

(2) Although the parties agreed that only individual employees can submit grievances to an arbitration panel of an agency specified by the parties, a substitute panel not agreed upon by the parties can receive and make binding decisions on grievances *not submitted by the individual employees.*

(3) Even though arbitration provisions of an agreement require a three-member panel—one representing labor, one the public and one management—a hearing held by a two-member panel (labor and public members) was proper and a decision by the two was legitimate and binding. (Here the management member was not boycotting the hearing. "He was unable to appear.")

(4) A Court can go beyond an arbitration decision to "restore the employee to her position" and, in ordering compliance, can award money damages, i.e., back pay, plus interest, retain jurisdiction, and order the parties to confer and return to the Court for a final order if agreement as to amount due is not reached.

REASONS FOR GRANTING THE WRIT.

The petitioner recognizes that it is not the function of the Supreme Court of the United States to address itself to the task of correcting the errors of lower courts, whether on matters procedural or the law. However, the action of the lower courts here does such extreme violence to established law in the area of labor-management relations as developed by this Court and courts in the various Circuits and States since *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448, that certiorari is indicated for either summary action by the Court or for further briefing and argument.

The decision of the District Court, left standing by the one paragraph order of the Court of Appeals which embraced the reasons set forth in the opinion of the District Judge, is not only in conflict with decisions of other Courts of Appeals on the rights which arise from agreements to arbitrate, but is in direct conflict with applicable decisions of this Court on this important federal question.

In fact, if our analysis of the law which has been developed by this Court since *Lincoln Mills, supra,* is correct, the Court of Appeals has, by its brief order, sanctioned such a departure from the established law by the District Court so as to call for an exercise of this Court's power of supervision as suggested by Rule 19.

The Court of Appeals not only ignored previous rulings of this Court deciding who has the right to invoke arbitration and the limits of arbitration agreements, but the Court's failure to articulate its reasons for adopting the trial court's opinion ignored its own interpretation of this very same Statement of Understanding in *Retail Clerks International Ass'n., etc. v. Lion Dry Goods, Inc.,* 341 Fed. (2d) 715 (1965), cert. denied, 382 U. S. 839, where the Court, citing *Atkinson v. Sinclair Refining Co.,* 370 U. S.

238, and referring to the requirement to submit disputes to arbitration, said:

> "With respect to this aspect of arbitration, it is purely a matter of contract, not a question of policy. The National labor policy favoring arbitration does not authorize arbitration unless the contract so provides.",

and also said—

> "Paragraph 7 of the Statement of Understanding,[4] which deals with arbitration, gives the right of arbitration to 'any *individual employee* who may have a grievance.' The individual employee may prosecute his grievance and take his case to the committee for arbitration. The Unions, not the employees, are the ones who sought arbitration. They are not given that right under the contract."

Vaca v. Sipes in Point Here.

The trial court's reliance on an ancient maxim rather than on the language of the written agreement of the parties is in direct conflict with the interpretation given to the *very language* of this *very agreement* by *this Court*, in addition to being in conflict with other decisions of this Court interpreting contract rights under Section 301(a) of the Labor-Management-Relations Act.

On February 27, 1967 this Court decided the case of *Vaca v. Sipes*, 386 U. S. 171. That portion of *Vaca* dealing with contract rights and labor agreements, Part II (B), i.e., *Union v. individual employee rights*, as well as *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965), dealt with the same legal principles involved in *Retail Clerks International Ass'n., etc. v. Lion Dry Goods, Inc.*, 341 Fed. (2d) 715, cert. denied, 382 U. S. 839, *supra*.

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[4] Paragraph 4 of the Lion Dry Goods Statement is identical to paragraph 7 of the Lasalle's Statement, to which the Court was referring.

In both *Vaca* and *Maddox, supra*, this Court had under consideration the relative rights of unions and individual employees in the processing of grievances either through the contract procedures, or through the courts, by virtue of the terms of collective bargaining agreements.

In *Maddox* the Court stated:

> "As a general rule, in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress."

The Court also pointed out that any rule which created the situation where an employee could select his own procedure would exert a disruptive influence.

In *Vaca* the Court again reviewed the nature of the arbitration process under collective bargaining agreements and asserted that in the usual case involving contract grievances, the Union, as the statutory agent, had the right to force arbitration or enforce the award, saying:

> "Since the employee's claim is based upon a breach of the collective bargaining agreement, he is bound by terms of that agreement which governs the manner in which contractual rights may be enforced."

At this point in the Court's discussion of arbitration rights under agreements, the Court made a direct reference to the Statement of Understanding which is the basis of this lawsuit and which was under consideration in *Retail Clerks, etc. v. Lion Dry Goods, Inc., supra.*

This Agreement Recognized in Vaca.

In footnote 10, at page 184, 386 U. S., the Court clearly distinguished *this Statement of Understanding* from the usual case involving collective bargaining agreements when it said:

"Occasionally the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See Retail Clerks v. Lion Dry Goods, Inc., 341 Fed. (2d) 715, cert. denied, 382 U. S. 839."

In referring to this provision in the Statement of Understanding, the Court recognized and reiterated its previous holdings that the processing of grievances and arbitration is a matter of contract and, as stated in *Atkinson v. Sinclair Refining*, 370 U. S. 238, among others:

"A party cannot be required to submit to arbitration any dispute he has not agreed to so submit."

In *Atkinson*, the Court will recall, the employer's case failed because the agreement between the company and union provided that arbitration Boards shall consider only "individual or local employee or local committee grievances."

Maddox and *Vaca*, as well as prior cases, have made it clear that courts, in the first instance, must determine who has the right to proceed to arbitration. Such rights, there seems to be no question, are determined by reference to the contract language and the substantive law as it has been developed under Section 301(a).

The substantive law as it has developed since *Lincoln Mills* clearly requires strict adherence to the precise language of the agreement and does not give a court discretionary rights to rely on an "ancient maxim" of the common law rather than the contract language, as the District Court did here. To do otherwise would ignore the national labor policy, of which Section 301(a) is a part, and the dynamics of collective bargaining. (*Atkinson v. Sinclair Refining Co. supra.*)

The brief order entered by the Court of Appeals would indicate that in addition to embracing the reasoning of the

District Judge, the Court placed considerable emphasis on what it called "the lengthy record of this case," meaning, we must assume, the length of time which has passed since the strike was settled. Such an assumption is valid in view of the fact that the case on appeal had no relation to the cases cited except for the fact that they arose out of the Lasalle strike and had in common the Statement of Understanding.

We submit that the passage of time should not have been in any sense a factor in the Court of Appeals' affirmance of the judgment rendered by the District Court. This is particularly so in view of the fact that in the two previous cases cited by the Court of Appeals the content of the Statement of Understanding, so far as arbitration rights are concerned, has not been put to the test of a trial on the merits. As this Court said, through Mr. Justice Brennan, in *N. L. R. B. v. Katz*, 369 U. S. 736 (1962):

> "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except in Section 10(b)."

Court of Appeals Ignores Vaca v. Sipes.

The holdings of the District Court, as reflected in the Judge's opinion, is so much at variance with established law that nothing but confusion and instability can result in the heavily unionized industrial States within the jurisdiction of the Court of Appeals of the Sixth Circuit if the judgment of the Court of Appeals affirming the District Court's opinion is permitted to stand, at least, without some clarification from the Court of Appeals how the Statement of Understanding is different in this case than it was in the previous case and especially how this Court's evaluation of the Statement of Understanding in *Vaca v. Sipes* is not valid in this case.

The action of the Court of Appeals effectively discards the Statement of Understanding which was the basis of settling a strike between the Union and retail department stores in Toledo after the parties failed to reach a new contract in 1957.

As a part and parcel of the Statement of Understanding, the parties deliberately and with clarity set forth that the Union did not represent and would not be recognized as the statutory agent of the employees until certified as a result of an election conducted by the National Labor Relations Board. Such an election has never been requested.

For the Courts to ignore, as the Court of Appeals did,[5] the reasoning and content of *Vaca v. Sipes, supra,* and other cases previously decided by this Court is to ignore the stipulations and agreements of the parties at the conclusion of a thirteen month strike and, in effect, grant representation rights to the Union when the Union has not been selected as the representative of the petitioner's employees as provided in the "Statement of Understanding."

For these reasons it is respectfully submitted that there was plain error by the courts below in completely disregarding the history and language of the Statement of Understanding and this Court's holdings under Section 301(a) which, when applied to this case, would limit the right to invoke arbitration to the individual employee rather than the Union, as the Court pointed out in *Vaca v. Sipes.*

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[5] *Vaca v. Sipes* was decided after the District Court's decision.

CONCLUSION.

For the reasons hereinabove set forth, petitioner respectfully urges that this petition for a writ of certiorari be granted and a summary order be entered reversing the judgments of the lower courts and order judgment for the petitioner, or, in the alternative, hear oral arguments on the questions presented herein after further briefing of the law.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

(Filed April 5, 1966.)

YOUNG, *J.*:

These cases all grow out of so-called "Statements of Understanding" which were made in December, 1958, to settle a long-drawn-out strike of the employees of the defendants.

Originally the first of the four cases involved a very important matter of labor law, which was ultimately determined by the Supreme Court. After that determination, there were further proceedings in the District Court and the Circuit Court of Appeals, which resulted in the matter being again remanded to the District Court for a determination of factual questions concerning the authority of the selected panel to act as an arbitrator.

With large volumes of argument, but very small quantities of evidence, the trivial remaining controversies between the parties have been heard and submitted to the Court. It is difficult to winnow out the wheat from the chaff in these bickerings between the parties, which include contentions that, by long lapse of time, all of the issues have become moot anyhow.

To try to get some sort of finality to this matter, this Court has concluded that the matters at issue ought to be determined as of the time that the various complaints were filed. The stipulations as to what has afterwards happened to the various employees involved is irrelevant to this determination, although it may have some bearing on the question involved in translating the awards of the arbitrators into dollars and cents. This, however, is a mere mechanical process which, if this Court orders the

enforcement of the awards, reasonable men ought to be able to work out unassisted. Whether these parties can do so, *quaere.*

The major contentions presented by the issues are rather numerous.

The first matter to be disposed of is that these actions are prosecuted by the union, instead of the individual employees involved. This issue arises out of the language of the settlement agreements that "Any individual employee who may have a grievance * * * may take his case to the chairman of the L-M-C * * *." It is claimed by the defendants that this language must be taken literally. The Court prefers to rely on the ancient maxim, which is the basis of a large area of our common law jurisprudence, *"Qui facit per alium, facit per se."* An individual employee is no less an individual because he seeks the active assistance of his union and its counsel to counterbalance the weight of his employer's forces of knowledgeable personnel and learned counsel. The complaints here involved are in fact those of individual employees, and the relief sought will inure to each employee alone and separately. This is sufficient.

The second issue is that after the first aggrieved employees found their employer had reversed the decision of the arbitrators, and resorted to the court for relief, the defendants boycotted any further hearings, and so claim that none of the matters subsequent to the original complaint were decided by a full panel, or upon full evidence. To state this argument is to refute it. We would be in a state of anarchy if parties to litigation could avoid decisions by the simple process of taking their dolls and going home. The defendants simply defaulted in these proceedings, and are in no better position than anyone else who defaults.

The third issue is that while the settlement accords provided that grievances would be taken "to the chairman of the L-M-C who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding," the charter of the L-M-C did not authorize it or its members to act as arbitrators. No evidence whatever was offered concerning the charter of the L-M-C. Since the L-M-C apparently had a finger, at least, in the drafting of the accords, absent some showing that its action was ultra vires, the Court is forced to conclude that it knew the limitations of its powers, and acted within them. "He who pleads must prove," and defendants have failed to offer any proof of their contention that the L-M-C charter forbade that which was done.

Somewhat along the same line is the fourth issue, that the settlement accords provided for grievances to be taken to the chairman of the L-M-C, who is to refer them to a panel of the L-M-C for decision, but that actually they were taken to Monsignor Doyle, who selected some people to hear them. In regard to this issue, much stress is laid upon some language appearing in the Annual Report of the Toledo Labor-Management-Citizens Committee for 1958, Defendants' Exhibit A, which says that the settlement agreement "* * * provided for unsettled grievances to be arbitrated by a Board of Arbitrators to be named by Msgr. Doyle—not as an L-M-C panel but as an arbitration board designated by Msgr. Doyle under terms of the settlement agreement."

No authorities have been cited to show why this Court should be bound by the construction of the agreements here that is set forth in some sort of a report issued by an organization which is not a party to the action, a court, or even an attorney. Even a *nisi prius* court is not bound by the construction put on legal documents by writers of re-

ports. Nor is there any reason to speculate as to whose ideas this report embodies, or why it embodies them. The construction may have been reached by stupidity, cowardice, or both. It is certainly a most strained one, based upon the language of the agreement. It is vigorously disputed by the plaintiff. It is entitled to no probative value whatever.

Moreover, the evidence in the record shows that in fact, at all times in issue, Monsignor Doyle was the duly elected, qualified and acting chairman of the L-M-C. The record shows that as such he appointed panels consisting of various other individuals who were members of the L-M-C to pass on the various grievances involved in this litigation. Although the membership of the panels changed from time to time, there were always three members appointed, one representing labor, one management, and one the public at large. The management representative didn't always appear, but was given full reports of the hearings and conclusions of the other members, and never expressed any dissent.

The record fails utterly to show that the panels were not what was called for in the settlement accords, or that their constitution was illegal or in any way improper.

The whole matter may be summarized by saying that the settlement accords set up machinery for the arbitration of grievances by individual employees of the defendants; various employees had grievances, all of which lay in the areas covered by the agreements; they were submitted to panels of arbitrators as contemplated by the agreement; the panels heard the grievances, decided them, and gave the parties notice of their findings.

It is elementary that under those circumstances, the Court cannot consider the matters of procedure and evidence in the arbitration hearings, but must order the en-

forcement of their awards. This Court will do so in these cases.

Counsel for the plaintiff may submit findings of fact, conclusions of law, and an order in accordance with this opinion within two weeks from receipt of a copy hereof. Defendants may submit counter findings and conclusions within ten days after receipt of a copy of plaintiff's findings and conclusions, after which the Court will enter its findings and judgment.

DON J. YOUNG,
United States District Judge.

APPENDIX A1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed May 4, 1966.)

YOUNG, *J.*:

FINDINGS OF FACT.

1. Plaintiffs are labor organizations which represent employees in an industry affecting commerce within the meaning of § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185(a), hereinafter referred to as the Act.

2. Plaintiffs and defendant executed certain documents called Statements of Understanding in settlement of a strike on December 24, 1958. These Statements of Understanding are contracts within the meaning of § 301 of the Act.

3. Plaintiffs presented an individual grievance on behalf of one Ruth Morris, an employee of defendant, to the

chairman of the Toledo Labor-Management-Citizens Committee, alleging that Ruth Morris had been improperly discharged by the defendant, and was entitled to restoration of her job under the Statements of Understanding.

4. Monsignor Michael J. Doyle at all times material herein was the duly elected, qualified, and acting chairman of the Toledo Labor-Management-Citizens Committee.

5. Upon due notice to defendant, Monsignor Michael J. Doyle as the chairman of the LMC, convened a panel made up of a representative of labor and a representative of management as provided in the Statements of Understanding to hear the grievance of Ruth Morris, which was heard on or about July 16, 1959.

6. Defendant notified Monsignor Michael J. Doyle by letter of April 20, 1959, prior to such hearing, that it would not participate in any further hearings of the LMC pursuant to the Statements of Understanding until the litigation in Case No. 8199 brought by plaintiffs was finally decided and terminated.

7. In accordance with such prior notice, defendant did not appear and participate in the hearings on July 16, 1959 and was thereupon in default.

8. The LMC Panel thereafter ruled that Ruth Morris was entitled to be restored to her job with defendant in accordance with the grievance filed on her behalf.

9. Notice of such finding was duly served upon defendant.

10. Defendant has at all times refused to abide by and honor such award of the LMC Panel on the grievance of Ruth Morris.

11. There is no evidence that the charter of the Toledo Labor-Management-Citizens Committee in any man-

ner precluded handling or processing of arbitration matters by the Committee or any of its representatives.

12. There was no accord between defendant and plaintiffs or any other party, that no further hearings of the LMC would be held until the litigation in Case No. 8199 was concluded.

CONCLUSIONS OF LAW.

1. Plaintiffs are labor organizations who represented employees of defendant for the purpose of presenting their grievances under the Statement of Understanding of the parties of December 24, 1958.

2. The grievance of employee Ruth Morris was an individual employee grievance under the Statement of Understanding which was properly presented to the Chairman of the Toledo Labor-Management-Citizens Committee by her representative in accordance with such Statement of Understanding.

3. The LMC Panel which heard the grievance was at all time properly constituted and authorized by the parties to hear such grievance and was in no manner prohibited or prevented from hearing such grievance and making an award thereon.

4. The award of the LMC Panel directing the defendant Lion Dry Goods, Inc., to restore Ruth Morris to her job is a valid arbitration award enforceable under § 301 of the Act.

5. Plaintiffs are entitled to final judgment as prayed for in their complaint, and for their costs.

DON J. YOUNG,
U. S. District Judge.

APPENDIX A2.

UNITED STATES DISTRICT COURT ORDER.

(Entered May 5, 1966.)

Upon the findings of fact and conclusions of law as set forth, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Judgment shall be entered for plaintiffs with costs.

2. The award of the Toledo Labor-Management-Citizens Committee on the grievance of Ruth Morris to the effect that Ruth Morris is entitled to be restored to her job under the Statement of Understanding of the parties is hereby made the judgment and order of this Court.

3. Defendant is hereby ordered and directed to take such action consistent with its personnel policies and practice as would make Ruth Morris whole by restoring her to her job as of the date of the award of the LMC and

4. The parties are ordered and directed to confer and attempt to decide as to what benefits Ruth Morris would be entitled to have pursuant to such award, and, in the event the parties cannot reach agreement, this Court will retain jurisdiction for entry of a final order on this matter, and

5. Defendant is further ordered and directed to pay interest at six percent per annum to Ruth Morris from the date of the award of the LMC as to any moneys to which she would be entitled, or from the date she would no longer be entitled to be employed by defendant, whichever is later.

DON J. YOUNG,
U. S. District Judge.

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS—February 23, 1965.

(341 F. 2d 715.)

Before: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

MILLER, Circuit Judge. The plaintiffs, Retail Clerks International Association, Local Unions Nos. 128 and 633, filed this action in the District Court to enjoin the defendants, Lion Dry Goods, Inc., and LaSalle's, from violating their agreements of December 24, 1958, with the plaintiffs, by refusing to accept and honor an arbitration award made by a panel of arbitrators pursuant to the terms of said agreement.

The material facts are not in dispute. The defendants are engaged in operating retail department stores in Toledo, Ohio. The plaintiffs are labor organizations representing employees in industries affecting commerce for the purpose of collective bargaining, but were not on December 24, 1958, or subsequent thereto, the recognized majority representatives of the employees of the defendants or either of them. This action was brought pursuant to Sections 301(a) and (b) of Title 29, United States Code, Labor Management Relations Act of 1947.

Plaintiffs were parties to collective bargaining contracts with defendants for many years prior to 1957. In November 1957 negotiations for renewal contracts were unsuccessful. Plaintiffs thereupon went on strike against defendant LaSalle's, which continued until December 24, 1958. The plaintiffs did not go on strike against the defendant Lion Dry Goods, Inc., but continued their dispute with that defendant until December 24, 1958. A few days before December 24, 1958, the Toledo Labor-Management-

Citizens Committee, a local mediation and arbitration body (hereinafter referred to as the Committee), proposed a plan for settling the dispute. Discussions ensued between the Committee and the plaintiffs and between the Committee and the defendants, but at no time were direct negotiations carried on between the plaintiffs and the defendants. Each side made known to the Committee the conditions under which it was willing to terminate the dispute and the Committee discussed these conditions with the other side. In this manner a basis for settlement was reached, which was known as a "Statement of Understanding," which was satisfactory to all parties. Each store sent to the Committee its "Statement of Understanding," calling it the basis on which the existing dispute between the locals and the defendants was to be fully and finally resolved. A few days later the locals wrote the Committee "we herewith agree to the conditions and guarantees of the Statement of Understanding." The conditions to be performed by each side were performed and the dispute was terminated.

The Statements contained the unions' acknowledgment that they were not then entitled to recognition as exclusive representatives and would not seek such recognition unless and until certified as so entitled in single store unit elections conducted by the National Labor Relations Board. The stores' agreement continued in effect detailed wage and hour schedules and provisions as to working conditions and other benefits, incorporated as exhibits to the Statement. Although the Statements were not identical in all respects they both contained the following provisions, which give rise to the present controversy. We quote the following from LaSalle's Statement of Understanding.

"* * * Nothing herein shall preclude an employee representative from entering areas of the store which

are open to customers; or from communicating with employees, provided such communication is on the employee's non-working time and in no way interferes with the operating of the business.

"7. Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with L-M-C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the chairman of the L-M-C who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding. The panel shall render its decision and order within fifteen days after the grievance has been submitted to it. The procedure regulating the hearing of the grievance by the L-M-C panel shall be determined by the panel."

Paragraph 1 of LaSalle's Statement of Understanding also provided that the striking employees would be reinstated without discrimination because of strike activities and without loss of seniority. Paragraph 2 provided that employees who made the required application for reinstatement would be returned to work "in their former position classifications if vacant or in positions comparable in duties and earning opportunities."

A few months later the following disputes arose. (1) The unions claimed the right of access to the employees' cafeterias in order to communicate with employees during their nonworking time. The defendants refused to allow union organizers this right of access, claiming that Paragraph 6 of the Statement of Understanding gave no right of access to the employees' cafeterias because they were not "areas of the store which are open to customers." It was stipulated between the parties for the purposes of this litigation that the employee cafeterias in the downtown stores of the defendants were located in areas not open to

customers. The union complained to the Committee, charging undue harassment of union organizers and a breach of the defendants' contract obligation; (2) two LaSalle's employees, who were salesladies in the Men's Furnishings Department, were fully reinstated after the strike to sales positions in the Men's Furnishings Department with the exception that the saleslady formerly assigned to sell men's shirts was assigned to sell men's sweaters, and the other saleslady, who was formerly assigned to sell sweaters, was assigned to sell shirts. It was stipulated by the parties that the two salesladies were, prior to leaving their employment because of the strike on or about November 23, 1957, employed as salesladies in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect, and that upon their return to work at LaSalle's after December 24, 1958, each was employed as a saleslady in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect. The failure of LaSalle's to assign these employees to their former selling stations brought a complaint from the union to the Committee.

Proceeding under the provisions of Paragraph 7 of LaSalle's Statement of Understanding, the Committee referred these complaints to a panel which held a hearing on March 5, 1959, and handed down its decision on March 12, 1959. Awards went to the unions on both complaints, holding that the unions' right to contact employees applied to employee cafeterias as well as the public cafeterias, and that both the clerks at LaSalle's should be restored to their identical positions which they had before the strike. The stores refused to honor and accept these awards, following which this action was filed to require the stores to comply with the awards.

This is the second time this case has been before this Court. A review of its history is as follows. An amended complaint was filed on June 19, 1959. The defendants filed an answer on June 29, 1959, asserting as their first defense that the Court lacked jurisdiction over the subject matter. In other defenses they denied that there was in existence any contract between the plaintiffs, or either of them, and the defendants, or either of them, or that assurances given by the defendants to the Committee were for the benefit of the plaintiff-unions. The answer also asserted that there was not in existence any contract between the plaintiffs and the defendants, or either of them, as contemplated by and provided for in the Labor Management Relations Act of 1947, and denied the right or authority of the Committee to arbitrate any grievance which the plaintiffs might claim to have. The case was submitted to the Court on the pleadings, a stipulation, briefs and oral argument.

The District Judge made findings of fact that the plaintiffs were not the recognized majority representatives of the employees of the defendants or either of them, that the Statement of Understanding given by each of the defendants to the Committee was a strike settlement statement, that it was not a collective bargaining contract negotiated by or on behalf of the plaintiffs with either of the defendants, and that there was no existing working contract between the plaintiffs and either of the defendants. He ruled as a matter of law that each Statement of Understanding was not a contract as contemplated by Section 301(a) of the Labor Management Relations Act of 1947 and that the Court was without jurisdiction of the subject matter of the action. The complaint was accordingly dismissed. The opinion of the District Judge is reported at *Retail Clerks International Association, Local Unions No. 128 and 633 v. Lion Dry Goods, Inc., and LaSalle's*, 179 F Supp. 564.

On appeal to the Court of Appeals this Court affirmed the judgment of the District Court. This ruling, in the form of an order, is reported at 286 F. (2) 235.

The Supreme Court granted certiorari and on February 26, 1962, reversed the judgment of the District Court. The opinion of the Court is reported at *Retail Clerks International Association, Local Unions, etc. v. Lion Dry Goods, Inc., et al.*, 369 U. S. 17. Reference is made to the opinions of the District Court and the Supreme Court for a more detailed statement of the facts. In reversing the judgment of the District Court and of the Court of Appeals the Supreme Court did not pass upon the merits of the controversy or construe Paragraphs 6 and 7 of the LaSalle's Statement of Understanding. Its ruling was restricted to the question whether the Statement of Understanding was a contract as contemplated by Section 301(a) of the Labor Management Relations Act of 1947. It held that the Statement of Understanding was such a contract and that the District Judge had jurisdiction of the action. The cause was remanded to the District Court for further proceedings consistent with its opinion.

Following remand, the plaintiffs moved for summary judgment on May 3, 1962. On May 11, 1962, the defendants filed a memorandum in response to the motion for summary judgment suggesting to the Court that the plaintiffs' motion was premature. The memorandum stated that the Clerk of the District Court had from time to time informed the defendants that the case would not take its place on the active list until a mandate was received from the Court of Appeals; that upon receipt of such mandate the District Court would reinstate the case to the active list by an order, a copy of which would be received by counsel for the parties; and that under such procedure the case had not been returned to the Court's docket and the

motion for summary judgment was premature. The memorandum also stated that if this was a misunderstanding as to the status of the case and the case had been reinstated on the docket, counsel for defendants requested permission to tender a motion to file an amended answer.

On May 24, 1962, the defendants moved for an order permitting them to amend their answer, pointing out that following the original decision of the District Court the Supreme Court had received the trilogy of cases involving the United Steelworkers, reported at 363 U. S., pages 564, 574, and 593, which made an amendment of the answer imperative in order for the defense to present issues which had become germane and proper by reason of said decisions. A proposed answer was tendered at the same time.

On September 25, 1962, the plaintiffs' motion for summary judgment was sustained. On September 26, 1962, the defendants' motion for an order permitting them to amend their answer was overruled. Defendants' request for consideration, filed on September 28, 1962, was denied on November 27, 1962. Judgment was entered on February 19, 1963, directing the defendants to comply with the arbitration awards of the Committee of March 12, 1959. This appeal followed.

Defendants contend that, although the Statement of Understanding given by each of them was a "contract" within the provisions of Section 301(a), Title 29, United States Code, with resulting jurisdiction in the District Court, as decided by the Supreme Court, the Committee was not empowered or authorized under the terms of the Statement of Understanding to conduct an arbitration of the two questions herein involved; that the two arbitration awards were incorrect and invalid; and that the District Judge erred in refusing to permit them to file their amended answers and in sustaining plaintiffs' motion for

summary judgment in the face of the existence of disputed questions of fact and without the opportunity for the defendants to be heard.

The plaintiffs contend that the controversies between the parties were grievances within the provisions of the Statement of Understanding; that the two awards made by the panel of arbitrators were final and binding under the provisions of Paragraph 7 of the LaSalle's Statement of Understanding and were not subject to review by the District Court or by this Court; and that there was no error on the part of the District Judge in sustaining the motion for summary judgment some four months and three weeks after it was filed, during which time the defendants failed to oppose it, although they were given an opportunity to do so under Rule 56(c), Rules of Civil Procedure.

Arbitration is a matter of contract and a party can not be required to submit to arbitration any dispute which he has not agreed so to submit. Whether or not a party to a contract is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court, not by the arbitrator, on the basis of the contract entered into by the parties. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582; *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241; *John Wiley & Sons, Inc. v. Livingston, etc.*, 376 U. S. 543, 546-547; *Jefferson City Cabinet Co. v. International Union, etc.*, 313 F. (2d) 231, 232-233, C. A. 6th, cert. denied, 373 U. S. 936.

If the Court finds as a matter of law that there is no valid contract between the parties providing for arbitration of disputes between the parties or, although such a contract may exist, it does not by its terms provide that the particular dispute involved is an arbitrable one, neither party can be required to submit the dispute to arbitration. *Atkinson v. Sinclair Refining Co., supra*, 370 U. S. 238, 241,

243; *Jefferson City Cabinet Co. v. International Union, etc., supra,* 313 F. (2) 231, 233, C. A. 6th, cert. denied, 373 U. S. 936; *Local Union No. 998, etc. v. B. & T. Metals Co.,* 315 F. (2) 432, C. A. 6th; *Timken Roller Bearing Co. v. N. L. R. B.,* 325 F. (2) 746, 752-753, C. A. 6th, cert. denied, 376 U. S. 971; *Palnau v. Detroit Edison Co.,* 301 F. (2) 702, 704, C. A. 6th; *Local Union No. 787, etc. v. Collins Radio Co.,* 317 F. (2) 214, 219-220, C. A. 5th; *Procter & Gamble Independent Union, etc. v. Procter & Gamble Mfg. Co.,* 312 F. (2) 181, C. A. 2nd, cert. denied, 374 U. S. 830; *Local Union No. 12405, etc. v. Martin Marietta Corp.,* 328 F. (2) 945, C. A. 7th.

If, however, the Court finds as a matter of law that a valid contract providing for arbitration of certain disputes exists and that the particular dispute involved is covered by the contract, arbitration will be decreed. In such a case whether procedural requirements under the contract have been complied with or have been excused by reason of the particular circumstances existing, is a question for the decision of the arbitrator. *John Wiley & Sons, Inc. v. Livingston, etc., supra,* 376 U. S. 543, 555-559; *Local 748, etc. v. Jefferson City Cabinet Co.,* 314 F. (2) 192, 194-196, C. A. 6th, cert. denied, 377 U. S. 904. Usually, collective bargaining contracts calling for arbitration provide that the decision of the arbitrator shall be final and binding. Paragraph 7 of LaSalle's Statement of Understanding so provided.

There is no real dispute between the parties about these legal principles. The difference between them is in the application of the principles to the particular facts of this case.

We agree with the appellees' contention that if the right to arbitration exists, which we will discuss later, the rulings or awards of the arbitrators are final and not subject to review by the Court. This contention is fully sup-

ported by the authorities. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 568; *United Steelworkers v. Warrior & Gulf Nav. Co., supra,* 363 U. S. 574; *Jefferson City Cabinet Co. v. International Union, etc., supra,* 313 F. (2) 231, C. A. 6th, cert. denied, 373 U. S. 936.

Our real problem is in determining whether the two disputes are matters which are arbitrable under the provisions of the Statements of Understanding. We recognize that the Supreme Court has stated in the recent *United Steelworkers* cases that the use of arbitration for the final disposition of labor-management disputes is favored as a national policy. At the same time, however, the Supreme Court has made it very clear in the cases hereinabove referred to that arbitration is a matter of contract and a party can not be required to submit to arbitration any dispute which he has not agreed so to submit. The recognition of this right was just recently restated in *John Wiley & Sons, Inc. v. Livingston, etc., supra,* 376 U. S. 543, 546-547. With respect to this aspect of arbitration, it is purely a matter of contract, not a question of policy. A national policy favoring arbitration does not authorize arbitration unless the contract so provides. *Atkinson v. Sinclair Refining Co., supra,* 370 U. S. 238, 241.

We are of the opinion that the claim of the unions was not one subject to arbitration. Paragraph 7 of the Statement of Understanding, which deals with arbitration, gives the right of arbitration to "any *individual employee* who may have a grievance." (Emphasis added.) The individual employee may prosecute his grievance and take his case to the committee for arbitration. The unions, not the employees, are the ones who sought arbitration. They are not given that right under the contract. *Atkinson v. Sinclair Refining Co., supra,* 370 U. S. 238, 241, 243; *Local*

Union No. 998, etc. v. B. & T. Metals Co., supra, 315 F(2) 432, 437, C. A. 6th; *Timken Roller Bearing Co. v. N. L. R. B., supra,* 325 F(2) 746, 753, C. A. 6th, cert. denied, 376 U. S. 971; *International Union, etc. v. Benton Harbor Malleable Industries,* 242 F(2) 536, 541-542, C. A. 6th, cert. denied, 355 U. S. 814. See: *Vulcan-Cincinnati, Inc. v. United Steelworkers of America, etc.,* 289 F(2) 103, 107-108, C. A. 6th.

The argument is made that the contention of appellants that the grievances herein involved were not arbitrable ones under the Statement of Understanding comes too late, in that the parties treated the issues as arbitrable and the appellants participated in arbitration without raising the question until after the adverse ruling of the arbitrators. We do not think that this argument is applicable under the present status of this case.

The record with respect to this is not as satisfactory as it could be. The amended complaint alleges that a panel of the Committee held a hearing on March 5, 1959, and transmitted its decision to the parties on March 12, 1959. The parties stipulated that counsel for the appellants appeared on behalf of the appellants at this meeting, which the parties in attendance "assumed" to be a meeting of a panel chosen by the Committee to perform proper functions delegated to it under the provisions of the Statement of Understanding. But neither the amended complaint nor the stipulation set out the proceedings of the meeting or advise us whether the appellants did or did not raise the question of the panel's jurisdiction in addition to the arguments on the merits.

In the letter of March 23, 1959, from appellant's counsel to the Chairman of the Committee, which appears to be in the nature of a petition for reconsideration, counsel refers to the question of the jurisdiction of the panel as well as to the merits of the decision. In the original an-

swer of the appellants, filed on June 29, 1959, ten days after the filing of the amended complaint, the appellants deny that any recognition was given to any decision of the Committee by way of a request for reconsideration of a decision of a panel of the Committee with regard to any rights claimed by the plaintiffs.

In the proposed amended answer, which the appellants tendered for filing, the appellants deny that they gave any assurances to the plaintiffs or to the Committee authorizing the Committee to act in the role of arbitrator "to any extent, or in any manner on grievances filed by the plaintiff unions." This proposed answer also denies that a panel authorized by and drawn from the Committee ever heard any dispute as alleged in the amended complaint and expressly alleges that the Committee is forbidden by its charter to serve as an arbitration agency, "a fact unknown to the defendants on December 24, 1958, March 5, 1959, March 12, 1959, April 7, 1959, or any other time pertinent to this action, and not discovered by the defendants until after the filing of the amended complaint herein." The tendered answer in a separate paragraph also expressly denies that the panel which acted in the premises was authorized by the appellants "to act in any way, to any extent, or in any manner whatsoever."

In the order overruling appellant's motion to file the amended answer, the only reason given for doing so is "good cause therefor appearing." In the order granting the plaintiff's motion for summary judgment, the reasons given for doing so are given as the judgment of the United States Supreme Court remanding the cause to the District Court, that there is no genuine issue of fact to be submitted to the trial court and the court's conclusion that the plaintiffs were entitled to judgment as a matter of law without, however, discussing the legal issues involved.

Accordingly, we do not construe the ruling of the District Judge as being based upon the theory that the appellants by their conduct conferred authority upon the panel to consider and pass upon the issues involved. There is no finding of fact to that effect. We are not permitted to make such a finding on this review. The position taken by the appellants at the meeting of the arbitrators and other statements bearing on the issue possibly made by them are not before us. Under the pleadings, including the proposed amended answer, it appears that these facts could be very much in dispute. It may be that this case may eventually be decided upon that ground, but the judgment can not be affirmed at the present time based upon such a reason.

With respect to the grievances of the two salesladies at LaSalle's, we are of the opinion that they were arbitrable grievances. The salesladies were employees of LaSalle's who were given the right of arbitration under the Statement. Although the union did not have the right to arbitrate this issue, and the amended complaint is very indefinite about whether the two employees or the union processed these grievances and presented them for arbitration, it does allege that the plaintiffs were representatives of the two employees in the proceeding, which allegation is accepted in the absence of a denial thereof.

With respect to the procedural aspects of the case, we are of the opinion that the District Judge was in error in overruling defendants' motion to amend their answer. Rule 15(a), Rules of Civil Procedure, provides for the filing of an amended pleading and states that "leave shall be freely given when justice so requires." The amended answer denied the authority of the selected panel to act as an arbitrator, which raised a new issue in the case, the determination of which involved factual questions not be-

fore the Court. Some of the facts alleged in the amended answer were very material to the issue and were not known by the appellants at the time of the arbitration or at the time the original answer was filed. The brief order sustaining the motion for summary judgment does not refer to this new issue, which apparently was not considered by the Court. We see no prejudice to the plaintiff in permitting the amended answer to be filed. *Cooper v. American Employers' Insurance Co.*, 296 F. (2) 303, 306-307, C. A. 6th. Clearly, there was no urgency in proceeding with the case. The amended answer was tendered on May 24, 1962. The motion to file it was not overruled until September 26, 1962. The Supreme Court said in *Foman v. Davis*, 371 U. S. 178, 182, "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." The Court also said in the opinion in that case that it is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. See also: *Cooper v. American Employers' Insurance Co., supra*, 29 F. (2) 303, 306, C. A. 6th; *Lone Star Motor Import, Inc., v. Citroen Cars Corp.*, 288 F. (2) 69, 75, C. A. 5th. The defendants should have been permitted to file the amended answer. *McHenry v. Ford Motor Co.*, 269 F. (2) 18, 24, C. A. 6th; *Breier v. Northern California Bowling Proprietors' Association*, 316 F. (2) 787, 789-790, C. A. 9th. The fact that it was tendered after remand to the District Court for further proceedings does not change the rule. *City of Texarkana, Texas, v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 203. Where an amended

pleading has been tendered and permission to file it should be given, an adversary motion for summary judgment should not be granted before it is filed and considered. *Castner v. First National Bank of Anchorage*, 278 F. (2) 376, 384, C. A. 9th; *Rossiter v. Vogel*, 134 F. (2) 908, 912, C. A. 2nd. See also: *Kane v. Chrysler Corp.*, 80 F. Supp. 360, 366, D. C. Del.

If the District Judge had permitted the amended answer to be filed, as we think he should, there would have been injected into the case the defenses asserted by appellants that the Committee was forbidden by its charter to act as an arbitrator and, in any event, the panel was not legally constituted. Under such circumstances the case was not one for summary judgment. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, rehearing denied, 322 U. S. 767; *S. J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F. (2) 235, 237-238, C. A. 6th, cert. denied, 375 U. S. 824.

The judgment is reversed and remanded for further proceedings consistent with the views expressed herein.

EDWARDS, Circuit Judge, Dissenting.

The encouragement of the use of arbitration as a device for quick and final disposition of labor-management disputes has been adopted as national policy, both by the United States Supreme Court and the Congress of the United States. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U. S. 593 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574 (1960); 9 U. S. C. §§ 3 and 4.

With all respect to my colleagues, I suggest that the disposition of this controversy arrived at in the District Court's judgment is proper implementation of that policy.

The agreement which the United States Supreme Court found to be a contract as contemplated by Sec. 301 (a) of the Labor Management Relations Act of 1947, *Retail Clerks v. Lion Dry Goods,* 369 U. S. 17, 25, 26 (1962), was entered into December 24, 1958. It provided for "final and binding arbitration" where a grievance arose "involving an interpretation of or arising under the terms of this understanding."

The parties in the current dispute were the parties involved in the contract referred to. Several months after the contract two grievances were submitted for arbitration under the contract, the parties proceeded to arbitration and a disposition was handed down by a panel appointed to arbitrate.

Defendants refused to accept these awards and that refusal led to litigation which started at the District Court level, 179 F. Supp. 564 (N. D. Ohio 1959), traveled to this court on appeal, 286 F. 2d 235 (C. A. 6, 1960), and to the United States Supreme Court, 369 U. S. 17 (1962), where the case was reversed and remanded to the District Court.

The District Judge then entered summary judgment on the pleadings and an agreed statement of facts, in accordance with what he thought to be the import and intent of the United States Supreme Court's opinion. Another appeal being taken to this Court, it is proposed that we again remand the matter—this time for trial at the District Court level.

I believe that, although this contract was no work of art, the intentions of the parties were reasonably effectively expressed therein, and that properly read it called for final and binding arbitration of all grievances "involving an interpretation or application of or arising under the terms of this understanding."

Where the contract calls for binding arbitration, the function of the court is limited to determining whether or not the party seeking arbitration is making a claim which, on its face, is governed by the contract. *United Steelworkers v. American Manufacturing Co., supra,* at 568.

I read the District Judge's decision as a finding that the parties were bound by the contract to arbitrate and that the issues presented for arbitration were arbitrable. I believe that as a matter of contract interpretation the District Judge was right in so holding.

Further, it is of great significance that both of the parties themselves treated the issues as arbitrable; that they both submitted the issues to arbitration; that they both participated in arbitration, and that the appellant first decided the issues were not arbitrable after appellant had lost before the arbitrator and then lost before the United States Supreme Court.

In this regard we note the following paragraph in the stipulation of facts upon which this case was originally submitted:

> "It is further stipulated by and between counsel for the respective parties that Merritt W. Green, counsel for the defendants, appeared on behalf of the defendants at a meeting held on March 5, 1959 in the Catholic Charities Building, Toledo, Lucas County, Ohio, which said meeting was presided over by Monsignor Michael Doyle and assumed by all parties in attendance to be a meeting of a panel chosen by the Toledo Labor-Management-Citizens Committee to perform proper functions delegated to such a panel under the provisions of Section 7 of plaintiffs' Exhibit B at page 2, and Section 4 of plaintiffs' Exhibit E at page 2, both of which exhibits are set forth in the amended complaint. (Statements of Understanding delivered to Monsignor Doyle by Lasalle's and The Lion Store respectively.)"

We also note Monsignor Doyle's letter to appellants' attorney when he sought reconsideration of the arbitration panel's decisions in this same matter:

> "Dear Mr. Green:
>
> "This acknowledges your letter of March 23, 1959 protesting the decision of the panel with respect to procedure of union organizers in contacting store employees for the purpose of soliciting union membership.
>
> "The agreement of December 24, 1958, provides among other things, that all panel decisions are 'final and binding.' The decision of the panel in this case was reached after a proper hearing and as panel decisions are final and binding, the panel sees no reason to re-open the matter."

Under the facts presented here if defendant-appellant had an objection to arbitration of either of the issues, it seems clear to me that his course of conduct waived it.

In *United Steelworkers v. American Manufacturing Co., supra,* the Supreme Court said:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173(d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Manufacturing Co., supra* at 566.

I believe the District Judge on remand properly enforced the arbitration awards rendered under the contract

on the pleadings and stipulated facts as they stood before him.

I also believe that the District Judge acted well within his discretion at that late hour of this litigation in refusing defendants' proffered amended answer. Over and above defendants' delay in presenting the proposed amendment, I profoundly doubt that the amended pleading tendered raised any factual issue which, if resolved in defendants' favor, would serve to change the result.

Further, Rule 15(a) of the Federal Rules of Civil Procedure provides for amendment of pleadings (after expiration of the normal 20 days' time for such amendment) "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This has universally been interpreted to mean that the trial court is vested with a sound discretion in granting or denying amendment and that his decision will not lightly be overturned. See *Bowles v. Biberman Bros.*, 152 F. 2d 700 (C. A. 3, 1946); *Chesapeake & Ohio Railway Co. v. Newmann*, 243 F. 2d 804 (C. A. 6, 1957); *Morton v. Local 20, Teamsters, Chauffeurs, and Helpers Union*, 320 F. 2d 505 (C. A. 6, 1963), *modified on other grounds*, 377 U. S. 252 (1964); 1A Barron & Holtzoff § 445, p. 722, and cases cited.

I do not believe that, on this record, justice requires a finding that the District Judge abused his discretion.

APPENDIX C.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, NO. 17409, OCTOBER 17, 1967.

On consideration of the lengthy record in this case (*Retail Clerks, Locals 128 and 633 v. Lion Dry Goods, Inc.*, 179 F. Supp. 564 (N. D. Ohio 1959), *aff'd* 286 F. 2d 235 (C. A. 6, 1960), *rev'd and remanded*, 369 U. S. 17 (1962), 341 F. 2d 715 (C. A. 6, 1965)), and the briefs and record in this appeal and the opinion of the District Judge, the judgment of the District Court is affirmed.

Entered by order of the court

CARL W. REUSS,
Clerk.

APPENDIX D.

STATEMENT OF UNDERSTANDING GIVEN TO L-M-C BY LION DRY GOODS.

1. The Lion Store will warrant to the L-M-C that the Company will not reduce rates of pay presently in effect or withdraw or reduce employee benefit programs currently provided. This assurance includes all improvements offered by the Company through the L-M-C on November 15th, 1957, which are already in effect. No employee will be discriminated against, by reason of Union activities, membership or non-membership. All employees will continue to have job security and no employee will be discharged except for just cause. Wage schedules currently in effect are appended as Exhibit A. Copies of hours and working conditions and other existing benefits, as requested by L-M-C are attached as Exhibit B.

2. Neither the Company nor the Union will interfere with the employee's right to join or not join a union, as provided and guaranteed by the Labor-Management-Relations Act. Nothing contained herein is to be construed as giving recognition to the union unless at some future time within the discretion of the union, the union is certified as having been chosen by a majority of employees in a single store unit election conducted by the National Labor Relations Board.

3. The Union agrees that it will not request bargaining rights unless it proves its right to represent the employees as provided in Paragraph 2 above; nor will the employer recognize any union except upon certification by the N. L. R. B.; nor will the Company file a petition for election unless a claim for representation is made upon the employer. Nothing herein shall preclude an employee representative from entering areas of the store which are open to customers; or from communicating with employees, provided such communication is on the employee's non-working time and in no way interferes with the operations of the business.

4. Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with the L-M-C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the chairman of the L-M-C, who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding. The panel shall render its decision and order within fifteen days after the grievance has been submitted to it. The procedure regulating the hearing of the grievance by the L-M-C panel shall be determined by the panel.

5. The Union will agree that immediately upon receipt of this statement of understanding by the Toledo Labor-Management-Citizens Committee it will cease all picketing, boycotting or other interference with the business of The Lion Store wherever located. The Union, the strikers, and the Company shall withdraw forthwith all petitions, unfair labor practice charges and litigation before the National Labor Relations Board and the Courts and further agree not to institute in the future any litigation involving or arising out of the instant dispute. The Union and the Employer shall execute mutually satisfactory releases, releasing and discharging each other, the International Union, the local unions involved, and representatives of the union in their representative or individual capacity, labor papers, and all other labor organizations or their representatives who acted in concert or cooperation in connection with the dispute, from any and all claims, demands, causes of action, of whatever nature or description arising out of the labor dispute, including but not limited to the strikes, picketing, boycotting, and all other activities which may have taken place up to the present date.

6. This understanding shall become effective in accordance with the letter of transmittal dated December 24, 1958.

THE LION STORE,
DONALD ROSS,
President.